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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MANUEL VILLANUEVA LUGO, Appellant.	2 CA-CR 2010-0306 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093968001

Honorable Christopher C. Browning, Judge
Honorable John S. Leonardo, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Manuel Lugo was convicted of three counts of sexual assault, two counts of kidnapping, and one count of aggravated assault with a deadly weapon or dangerous instrument. One of the kidnapping charges and the aggravated assault charge were dangerous offenses; the other kidnapping charge was a dangerous crime against children. The trial court sentenced Lugo to a combination of concurrent and consecutive prison terms totaling 25.75 years. On appeal, he argues the court erred in failing to make a finding he was competent or capable of rejecting a favorable plea offer. He also claims the court erred in denying his motion for a judgment of acquittal and in failing sua sponte to provide an instruction on false imprisonment. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the jury's verdicts. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). Lugo became acquainted with the victim, V., through a telephone chat service. On October 7, 2009, he met V. in person at her residence. After spending some time together there, V. and her two-year-old son left with Lugo in his car. Although they had planned to go to a mall, Lugo made a detour to his own residence because he said he was having problems with his vehicle.

¶3 Lugo's home was located in a semi-rural area unfamiliar to V. When V.'s son grew restless at the house, V. went into Lugo's bedroom to change her son's diaper and calm him down. There, Lugo appeared with a knife, threatened V. with it, and told her she was "going to be raped." Lugo ordered V. to stay in the room and told her that if

she did not do what he wanted, he would hurt her. When vaginal intercourse with V. proved difficult, Lugo forced her to perform fellatio, and he proceeded to have vaginal intercourse with her again. V.'s son was with her in the bedroom throughout this incident and, at one point when he cried, Lugo grabbed him by the neck.

¶4 Later that evening, Lugo drove with V. and her son to a convenience store in order to steal beer. Once Lugo was inside the store, V. got out of the vehicle "screaming and hollering" and looking "absolutely terrified." She reported to a customer that the man she was with had raped her, and a call was made to law enforcement.

¶5 A Pima County grand jury charged Lugo with seven felony offenses and one misdemeanor count of shoplifting. At a *Donald*[1] hearing before trial, Lugo rejected a plea offer that would have required him to plead guilty to one count of attempted sexual assault and one count of kidnapping. Under the terms of the offer, he would have been required to serve between two and 8.75 years in prison for the attempted sexual assault charge and would have been eligible for probation for the kidnapping charge, although the trial court would have retained the discretion to impose either a concurrent or consecutive sentence of up to 12.5 years for that offense.

¶6 At the conclusion of his trial, the jury acquitted Lugo of the single count of child abuse with which he was charged. He was convicted of the remaining felony counts of aggravated assault, kidnapping, and sexual assault, as noted above. Lugo was not tried for the misdemeanor shoplifting charge, and the trial court dismissed it in a

[1]*State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

minute entry order. After being sentenced to over twenty-five years' imprisonment, Lugo filed this appeal.

Discussion

Plea Offer

¶7 Lugo first contends "the trial court erred in failing to make a determination that [he] was competent or capable of rejecting a favorable plea offer and deciding to proceed to trial." Preliminarily, we note that Lugo identifies no error with the trial court's explanation at the *Donald* hearing of the plea offer's terms and the range of potential legal consequences Lugo faced if he accepted or rejected it. In addition, Lugo has not complied with Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., by identifying and citing authority for the standard of review he believes applies to his contention "at the outset of [his] discussion."

¶8 As best we understand his argument, Lugo essentially disputes the trial court's determination at the *Donald* hearing that he "knowingly, voluntarily, [and] intelligently" had rejected the plea. He maintains the court failed to take into consideration his youth, lack of a high school education, unfamiliarity with the legal system, and the apparent immaturity and poor reasoning demonstrated by his decision to forgo the offer.[2] These factors, in Lugo's words, "strongly suggested that [he] may not

[2]Inexplicably, Lugo also asserts the trial court made "[n]o inquiry . . . whether [Lugo] had even read the plea offer and understood it." In fact, the court confirmed through a series of questions to Lugo that he knew he had been offered a plea agreement, he had "seen" it, he had discussed it with his attorney, and his attorney had explained its terms to him. Furthermore, as the court was explaining the terms of the plea agreement to Lugo and the potential consequences of accepting or rejecting it, the court repeatedly

have truly understood the consequences of rejecting the plea." But the record, viewed in the light most favorable to upholding the court's determination, provides reasonable evidence to support the court's finding that Lugo understood the plea and intelligently chose to reject it notwithstanding the potential impediments to him doing so. *See State v. Murdaugh*, 209 Ariz. 19, ¶ 33, 97 P.3d 844, 852 (2004). Thus, we will not disturb the court's discretionary determination. *See id.*

¶9 To the extent Lugo suggests the trial court applied the wrong competency standard, that argument is meritless. Relying on *Westbrook v. Arizona*, 384 U.S. 150 (1966), and *Sieling v. Eyman*, 478 F.2d 211 (9th Cir. 1973), Lugo maintains "a higher level of competency" must be demonstrated by defendants who accept or reject plea agreements than by those who merely stand trial. And, he concludes the trial court failed to discharge its "protective duty" here by not making a determination he was "competent" or "capable" under this heightened standard. Lugo overlooks that the Supreme Court expressly has rejected *Sieling*'s "two different competency standards" and has characterized that case as "read[ing] too much into *Westbrook*." *Godinez v. Moran*, 509 U.S. 389, 396-97 (1993). Insofar as *Westbrook* suggested that a "heightened standard" applies to defendants who plead guilty or waive their right to counsel, the Court meant that the requirements are greater because a trial court must determine both that the defendant is competent and, additionally, that "the waiver of his constitutional rights is knowing and voluntary." *Godinez*, 509 U.S. at 400. As the Court clarified in

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asked whether he understood the information the court had conveyed to him, and Lugo repeatedly replied that he did.

Godinez, *Westbrook* did not specify a "heightened standard of *competence*," as a competence inquiry focuses on the defendant's mental capacity and ability to understand the proceedings, *id.* at 401 & n.12, and the same standard applies to defendants pleading guilty and not guilty alike.[3] *Id.* at 398-99.

¶10 We further observe that a formal competency determination is not required in all cases, *id.* at 401 n.13, and one would not be required here even under *Sieling*'s rationale. Unlike that case, "where a substantial question of [the] defendant's mental capacity ha[d] arisen, " Lugo represents "the typical case—that is, [one in which] the defendant's sanity or mental capacity has not been put in issue" and where the validity of his decision "can be assessed with an assumption that he is mentally capable of making [it]." 478 F.2d at 214. Accordingly, Lugo has identified no error that would entitle him to relief.

Motion for Judgment of Acquittal

¶11 Lugo next argues there was only sufficient evidence to support a single charge of sexual assault based on vaginal intercourse; hence, the trial court should have found insufficient evidence supporting either counts one or three pursuant to Rule 20, Ariz. R. Crim. P. Lugo's conviction on the first count of sexual assault was for the first occurrence of vaginal intercourse, and the third count was for the second occurrence of vaginal intercourse. Sexual assault based on vaginal intercourse requires intentional or

[3]Although the Court later appeared to limit *Godinez* with respect to criminal defendants who are "mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial [themselves]," *Indiana v. Edwards*, 554 U.S. 164, 167, 173-74 (2008), we are not presented with that situation here.

knowing penetration of any object into the victim's vulva. *See* A.R.S. §§ 13-1401(3), 13-1406(A).

¶12 We review a trial court's ruling on a Rule 20 motion for an abuse of discretion, *State v. Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d 118, 121 (App. 2001), and will reverse a trial court's ruling "only if there is a complete absence of substantial evidence to support the charges." *Id*. Denying a motion is proper "where reasonable minds could differ on the inferences to be drawn from the evidence presented." *State v. Belyeu*, 164 Ariz. 586, 590, 795 P.2d 229, 233 (App. 1990).

¶13 Answering questions about the initial sexual encounter, V. testified that she felt Lugo's penis penetrate her vulva "[a]t the ending." When asked if penetration occurred a second time, V. replied "[t]he last time he did . . . [y]eah." Lugo construes V.'s testimony to support one instance of successful penetration, count three, and insufficient evidence to support count one. However, after reviewing the record, we are not convinced that there is "a complete absence of substantial evidence" as to count one. *Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d at 121.

¶14 Here, a reasonable juror could infer from V.'s testimony that penetration occurred "[a]t the ending" of the first encounter, as well as "[t]he last time" during the third encounter. Because reasonable minds could differ on V.'s testimony, the trial court correctly denied Lugo's motion of acquittal and submitted the issue to the jury. Therefore, we affirm the jury's verdicts on counts one and three.

Jury Instruction

¶15 Last, Lugo argues the trial court erred in failing to instruct the jury on "false imprisonment."[4] As both parties acknowledge, unlawful imprisonment is a lesser-included offense of kidnapping, the former offense being committed by knowingly restraining a person, A.R.S. § 13-1303, and the latter offense requiring the additional element of an intent to perform an act or further a purpose that is enumerated in A.R.S. § 13-1304(A). *State v. Tschilar*, 200 Ariz. 427, ¶ 40, 27 P.3d 331, 341 (App. 2001); *State v. Flores*, 140 Ariz. 469, 473, 682 P.2d 1136, 1140 (App. 1984).

¶16 Lugo did not request a verdict form for unlawful imprisonment below, nor did he request an instruction on this offense or otherwise object to the trial court's instructions on this basis when given the opportunity. He therefore has waived the issue pursuant to Rule 21.3(c), Ariz. R. Crim. P.

¶17 Lugo nevertheless maintains the trial court committed fundamental error by refusing to instruct the jury sua sponte. In a noncapital case, a trial court has a duty to provide lesser-included offense instructions sua sponte only when the absence of such an instruction "would fundamentally violate [the] defendant's right to a fair trial." *State v. Lucas*, 146 Ariz. 597, 604, 708 P.2d 81, 88 (1985), *overruled in part on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996); *accord State v. Whittle*, 156 Ariz. 405, 407, 752 P.2d 494, 496 (1988); *see also State v. Vickers*, 129 Ariz. 506, 512-13, 633 P.2d 315, 321-22 (1981) (explaining application of Rule 21.3(c) to noncapital offenses).

[4]We refer to the offense as "unlawful imprisonment" as provided in the relevant statute.

Accordingly, we review the absence of an unrequested lesser-included offense instruction only for fundamental error. *Lucas*, 146 Ariz. at 603-04, 708 P.2d at 87-88; *see also* Ariz. R. Crim. P. 21.3(c) cmt. (observing waiver provision of rule does not bar defendant from alleging fundamental error).

¶18 We have described our inquiry in this context as being whether the lack of an instruction "interferes with [the] defendant's ability to conduct his defense." *Lucas*, 146 Ariz. at 604, 708 P.2d at 88. Because a defendant or his counsel might choose not to request an instruction on a lesser-included offense for a pair of strategic reasons—specifically, the defendant might wish to (1) be acquitted rather than convicted of a lesser crime or (2) work "mischief" by seeking a favorable verdict with the instructions provided and assigning error if he is disappointed, *State v. Vanderlinden*, 111 Ariz. 378, 379-80, 530 P.2d 1107, 1108-09 (1975)—this court rarely will find the absence of an instruction on a lesser-included offense to be fundamental error, even though it conceivably could rise to this level. *Cf. State v. Eddington*, 226 Ariz. 72, ¶ 22, 244 P.3d 76, 84 (App. 2010) (recognizing erroneous instructions seldom warrant relief under fundamental error review).

¶19 Here, the absence of an unlawful imprisonment instruction did not interfere with Lugo's defense, which was that the encounter was consensual and V.'s account was not credible. Moreover, for an instruction on a lesser-included offense to be required, "the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense." *State v. Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d 148, 151 (2006). Here, Lugo either restrained V. and her child in the bedroom to commit a sexual

offense, or their encounter there was consensual and no unlawful restraint occurred.[5] *Cf. Lucas*, 146 Ariz. at 604, 708 P.2d at 88 (instruction not required when defendant's admissions and consent defense meant "a jury could only hold [defendant] either guilty of the greater charge of kidnapping with the intent to commit rape, or not guilty at all"). Because the unrequested instruction was neither supported by the evidence nor important to Lugo's defense, we find no error in the trial court's instructions to the jury.

Disposition

¶20 Lugo's convictions and sentences are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

[5]On this point, Lugo's arguments regarding his mental state when grabbing V.'s son are misplaced. The kidnapping of the child, which formed the basis of count eight, occurred when Lugo threatened V. with a knife and prevented her from leaving the bedroom. Lugo's alleged physical contact with V.'s son formed the basis of the child abuse charge of which he was acquitted.